IMEJ MUHIBAH SDN BHD v. PINTAR ASIAMAS SDN BHD (IN LIQUIDATION) & ORS

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
NOR BEE ARIFFIN JCA
[CIVIL APPEAL NO: A-02(IM)(NCVC)-2317-11-2017]
29 APRIL 2019

CIVIL PROCEDURE: *Jurisdiction – High Court – Coordinate jurisdiction – Applicant applied for leave to proceed against company under liquidation – First High Court granted leave and orders sought – Applicant claimed against company at second High Court – Second High Court struck out claim as maker of affidavit in support for leave application failed to disclose he was undischarged bankrupt and set aside injunction and leave orders – Whether second High Court could strike out claim and set aside orders made by first High Court – Whether there were special circumstances warranting striking out and setting aside – Whether second High Court acted in excess of jurisdiction – Principles and exceptions stipulated in Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd – Rules of Court 2012, O. 33*

The appellant and the first respondent entered into a joint venture agreement ('JVA') to develop a piece of land. However, the first respondent later terminated the JVA *via* a letter signed by its director ('the second respondent'). Prior to the termination of the JVA, the first respondent allegedly transferred the land to the third respondent. As the first respondent was already wound up, the appellant applied for leave, at the Taiping High Court, to proceed against the first respondent under liquidation, pursuant to s. 226(2) of the Companies Act 1965. The Taiping High Court granted leave and an injunction order. The appellant then filed a claim, at the Ipoh High Court, (i) challenging against the registration and/or transfer of the land in the third respondent's name; and (ii) seeking an order that the said registration and/or transfer be set aside. Before trial commenced, the second and third respondents raised a preliminary objection on the ground that leave to commence proceedings against the first respondent was improperly obtained at the Taiping High Court as the affidavit in support was affirmed by an undischarged bankrupt. It was therefore submitted that since the affidavit in support was in breach of the law, it was void and the appellant's leave was obtained unlawfully. The High Court Judge ('HCJ') (i) struck out the appellant's entire claim on the sole ground that the maker of the affidavit in support failed to disclose that he was an undischarged bankrupt; and (ii) set aside the injunction and leave orders. Hence, the present appeal. The primary issue that arose for adjudication was whether the HCJ acted in excess of jurisdiction in deciding that the order of the Taiping High Court granting leave to the appellant to proceed with the claim was bad in law.

A **Held (allowing appeal)**

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The HCJ acted in excess of his jurisdiction in erroneously applying the exception stated in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* ('*Badiaddin*'). The HCJ fell into error for a number of reasons. (para 20)

(2) A court should not willy-nilly set aside an order made by another court of coordinate jurisdiction. The order made must be respected and could only be set aside in exceptional circumstances, as set out in *Badiaddin.* If it does not come within the exceptions set out in *Badiaddin*, the general rule must apply in that an aggrieved party must appeal to a higher court. In the present case, the leave order did not fall within the exceptions. There was no question of the order being made without jurisdiction or being made in contravention of any statute or whether it was made in breach of the rules of natural justice. The only criticism was that the affidavit in support was defective as it was affirmed by a bankrupt who had not disclosed his status. The correct approach would have been to apply before the same winding up court and have the leave order set aside. There was no objection to the leave application by the liquidator of the first respondent (paras 21 & 22)

(3) The second and third respondents were not parties in the winding up proceedings. The leave order only concerned the first respondent in liquidation. It was doubtful whether the second and third respondents could be considered as parties aggrieved by the leave order. As such, they would not even have the *locus* to set aside the leave order if they had applied to the winding up court. Furthermore, the claim of the parties at the Ipoh High Court was certainly not about whether the leave order ought to be set aside. The first respondent's interest was for the matter to be fully litigated so that the issue of fraud could be decided by the court. There was no relief for the leave order to be set aside. It was only when the trial was about to commence that the second and third respondents raised the issue of whether leave was properly obtained. (paras 23 & 24)

(4) The HCJ had no jurisdiction to consider the issue raised and ought to have declined to act under O. 33 of the Rules of Court 2012. After all, the application was made on the eve of the trial and no formal application was even filed. Importantly, there was no material for the HCJ to act upon except for the pleadings which did not contain any relevant material on the issue raised. Instead, the HCJ appeared to rely on witness statements filed which had yet to be received into evidence. It was most inappropriate for the HCJ to have done so. The action was remitted back to the High Court for trial. (paras 25 & 26)

Bahasa Malaysia *Headnotes*

Perayu dan responden pertama telah memeterai satu perjanjian usaha sama ('PUS') untuk membangunkan sebidang tanah. Walau bagaimanapun, responden pertama kemudian menamatkan PUS tersebut melalui surat yang ditandatangani pengarahnya ('responden kedua'). Sebelum PUS ini ditamatkan, responden pertama dikatakan memindah milik tanah tersebut kepada responden ketiga. Oleh kerana responden pertama telah digulung, perayu memohon kebenaran, di Mahkamah Tinggi Taiping, untuk meneruskan dengan tindakan terhadap responden pertama yang dalam likuidasi, selaras dengan s. 226(2) Akta Syarikat 1965. Mahkamah Tinggi Taiping memberi kebenaran dan mengeluarkan satu perintah injunksi. Perayu kemudian memfailkan satu tindakan, di Mahkamah Tinggi Ipoh, (i) mencabar pendaftaran dan/atau pindah milik tanah atas nama responden ketiga; dan (ii) memohon perintah agar pendaftaran dan/atau pindah milik tersebut diketepikan. Sebelum bermula perbicaraan, responden kedua dan ketiga membangkitkan bantahan awalan atas alasan kebenaran memulakan prosiding terhadap responden pertama diperoleh secara tidak teratur di Mahkamah Tinggi Taiping kerana afidavit sokongannya diikrarkan oleh seorang bankrap yang belum dilepaskan. Dihujahkan bahawa oleh kerana afidavit sokongan melanggar undang-undang, afidavit tersebut terbatal dan kebenaran perayu diperoleh secara tidak sah. Hakim Mahkamah Tinggi ('HMT') membatalkan seluruh tuntutan perayu semata-mata atas alasan pembuat afidavit sokongan gagal mendedahkan dia seorang bankrap yang belum dilepaskan; dan (ii) mengetepikan perintah injunksi dan kebenaran. Maka timbul rayuan ini. Isu utama yang timbul untuk diputuskan ialah sama ada HMT bertindak melangkaui bidang kuasa beliau apabila memutuskan perintah Mahkamah Tinggi Taiping memberi kebenaran kepada perayu meneruskan dengan tuntutan, adalah tidak sah.

Diputuskan (membenarkan rayuan)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi bertindak melangkaui bidang kuasa beliau apabila terkhilaf mengguna pakai pengecualian yang termaktub dalam *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* ('*Badiaddin*'). Hakim Mahkamah Tinggi terkhilaf akibat beberapa sebab.

(2) Satu-satu mahkamah tidak boleh sewenang-wenangnya mengetepikan satu perintah yang dibuat oleh satu lagi mahkamah yang berbidang kuasa serentak. Perintah ini mesti dihormati dan hanya boleh diketepikan dalam hal-hal keadaan luar biasa, seperti yang dinyatakan dalam *Badiaddin.* Jika tidak terangkum dalam pengecualian-pengecualian yang dinyatakan dalam *Badiaddin*, peraturan am terpakai iaitu pihak yang terkilan mesti merayu ke mahkamah yang lebih tinggi. Dalam kes ini,

perintah kebenaran tidak terangkum dalam pengecualian-pengecualian tersebut. Tiada persoalan tentang perintah dibuat tanpa bidang kuasa atau dibuat bertentangan dengan statut atau sama ada ada perintah tersebut melanggar peraturan-peraturan keadilan asasi. Satu-satunya kritikan ialah afidavit sokongan yang dibuat cacat kerana diikrarkan oleh seorang bankrap yang tidak mendedahkan statusnya. Pendekatan yang betul ialah dengan memohon di mahkamah penggulungan yang sama dan memohon agar perintah kebenaran tersebut diketepikan. Tiada bantahan terhadap permohonan kebenaran oleh pelikuidasi responden pertama.

(3) Responden kedua dan ketiga bukan pihak dalam prosiding penggulungan. Perintah penggulungan hanya membabitkan responden pertama dalam likuidasi. Diragui sama ada responden kedua dan ketiga boleh dianggap pihak yang terkilan dengan perintah kebenaran. Oleh itu, mereka tidak mempunyai *locus* pun untuk mengetepikan perintah kebenaran jika mereka memohon di mahkamah penggulungan. Tambahan lagi, tuntutan pihak-pihak di Mahkamah Tinggi Ipoh sememangnya bukan sama ada perintah yang dipohon wajar diketepikan. Responden pertama ingin hal perkara tersebut dilitigasi sepenuhnya agar isu penipuan boleh diputuskan oleh mahkamah. Tiada relief agar perintah kebenaran diketepikan. Hanya apabila perbicaraan hendak bermula barulah responden kedua dan ketiga membangkitkan isu sama ada kebenaran diperoleh secara teratur.

(4) Hakim Mahkamah Tinggi tiada bidang kuasa mempertimbangkan isu yang dibangkitkan dan sepatutnya enggan bertindak bawah A. 33 Kaedah-kaedah Mahkamah 2012. Apatah lagi apabila permohonan dibuat sebelum perbicaraan malah tiada permohonan rasmi yang difailkan. Bahkan lebih penting, tiada material untuk tindakan HMT kecuali pliding yang tidak mengandungi apa-apa bahan yang relevan dengan isu yang dibangkitkan. Sebaliknya, HMT seolah-olah bergantung pada kenyataan saksi-saksi yang belum diterima sebagai keterangan. Hakim Mahkamah Tinggi tidak wajar berbuat demikian. Tindakan ini dikembalikan ke Mahkamah Tinggi untuk dibicarakan.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Ng King Chong & Anor v. Ooi Kim Geik & Ors [2019] 2 CLJ 246 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(d), (e)
Companies Act 1965, s. 226(2)
Rules of Court 2012, O. 33 rr. 2, 5

For the appellant - Ranjan Chandran & Chandni Anantha Krishnan; M/s Hakem Arabi & Assocs
For the 1st respondent - Pamela Ephraim; M/s Susielan & Assocs
For the 2nd respondent - Cheah Sau Voon; M/s KH Wong, Chin & Cheah
For the 3rd respondent - Choy Kam Lee; M/s KL Choy & Co

[Editor's note: For the High Court judgment, please see Imej Muhibah Sdn Bhd lwn. Pintar Asiamas Sdn Bhd & Yang Lain [2018] 1 LNS 100 (overruled).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal emanates from the decision of the Ipoh High Court given on 10 October 2017. The High Court had struck out the plaintiff/appellant's claim, set aside an injunction order dated 30 August 2016 and set aside the leave order dated 29 January 2015 obtained from the Taiping High Court sitting as the winding-up court.

[2] Aggrieved with the orders made, the plaintiff/appellant filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Brief Facts

[3] The salient facts giving rise to the civil suit can be stated as follows. The appellant and the first respondent had entered into a joint venture agreement dated 1 August 2012 ("JVA") to jointly develop a piece of land known as Lot 40481, Mukim Hulu Kinta, Daerah Kinta ("the said land") into a housing estate. A power of attorney (PA) dated 1 August 2012 was executed by the first respondent in favour of the appellant.

[4] By a letter dated 17 March 2014, the first respondent unilaterally terminated the JVA. The appellant objected to the termination on the basis that it was able and willing to perform its obligations as covenanted to develop the land. The said termination letter of the first respondent was signed by the second respondent purportedly as director of the first respondent. It was contended that he had already resigned on 22 January 2014 and had therefore no authority to sign the letter at the material time.

[5] Prior to the unilateral termination of the JVA, the first respondent, it was asserted, had fraudulently transferred the said land to the third respondent on 9 December 2013 by a sale and purchase agreement (SPA) executed for a consideration sum of RM1,834,900. The appellant's position was that this transfer was in clear breach of cl. 20 of the JVA that prohibited any sale, transfer, conveyance of the land when the JVA was still subsisting.

[6] Before the plaintiff could file its writ, the first respondent was wound up on 17 October 2014. The appellant then applied for leave to proceed against the first respondent under liquidation pursuant to s. 226(2) of the Companies Act 1965. Leave was granted by the Taiping High Court on 29 January 2015.

[7] The appellant then filed the instant claim. The appellant, in the claim, challenged the registration and/or transfer of the said land in the third respondent's name and sought an order that the said registration and/or transfer be set aside. An injunction order dated 30 August 2016 was granted by the High Court which was confirmed by the Court of Appeal.

At The High Court

[8] At the High Court, as the trial was about to commence, a preliminary objection was raised by the second and third respondents. The contention was that leave to commence proceedings against the first respondent was improperly obtained. It was argued that in the application for leave before the Taiping High Court, an affidavit in support was affirmed by one Sukhdev Singh s/o Arjan Singh ("Sukhdev Singh") who was an undischarged bankrupt. Except for the fact that he was the manager of the appellant, the deponent had not disclosed his status as a bankrupt in the affidavit. It was therefore submitted that since the affidavit in support to obtain leave was in breach of the law, it was void and the appellant's leave was obtained unlawfully.

[9] The learned judge considered that he had jurisdiction to hear the preliminary objection under O. 33 r. 5 of the Rules of Court 2012 ("ROC 2012") without any formal application. After hearing submissions, the learned judge made the orders which are now the subject-matter of the instant appeal. The following is how the learned judge assessed the issue:

> [25] Berdasarkan kepada fakta yang tidak dipertikaikan dan peruntukan undang-undang yang dinyatakan tersebut, adalah didapati bahawa perintah kebenaran yang diperoleh plaintif bagi membawa tindakan terhadap defendan pertama telah dibuat di luar aturan, tidak sah dan batal. Walau bagaimanapun, mahkamah ini sedar bahawa prosiding bantahan awalan yang dibangkitkan peguam-peguam defendan keenam dan ketujuh bukanlah forum yang sesuai untuk mengetepikan perintah kebenaran yang dikeluarkan Mahkamah Tinggi Taiping. Satu perintah yang telah sempurna dikeluarkan mahkamah yang kompeten hanya boleh diketepikan melalui satu tindakan berasingan bagi tujuan tersebut. Lihat keputusan Mahkamah Persekutuan di dalam kes *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 dan *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1.
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> [26] Namun begitu, mahkamah ini tidak boleh menutup sebelah mata dengan membiarkan sahaja perintah kebenaran yang diperoleh secara luar aturan digunakan di dalam prosiding di hadapannya. Dengan itu,

mahkamah menggunakan kuasa budi yang ada di bawah Aturan 33 kaedah 2 untuk mendengar bantahan awalan peguam-peguam defendan keenam dan ketujuh dengan mengarahkan pihak-pihak mengemukakan hujahan serta seterusnya membuat keputusan di atas bantahan awalan tersebut.

[27] Setelah dibuat penelitian dan pertimbangan ke atas bantahan awalan, persoalan undang-undang yang dibangkitkan peguam-peguam defendan keenam dan ketujuh melalui bantahan awalan dijawab secara positif. Tindakan plaintif terhadap defendan pertama tidak dapat dipertahankan. Oleh kerana tindakan plaintif terhadap defendan-defendan yang lain bergantung kepada perjanjian yang dimasuki di antara plaintif dan defendan pertama, maka tuntutan plaintif terhadap mereka juga tidak boleh dipertahankan.

[28] Setelah ternyata kepada mahkamah bahawa keputusan mengenai bantahan awalan yang dibangkitkan peguam-peguam defendan keenam dan ketujuh dapat menyelesaikan atau pun dapat memuktamadkan keseluruhan tindakan dan menjadikan perbicaraan penuh kausa tindakan ini tidak perlu, mahkamah boleh membuat keputusan untuk membatalkan writ saman dan pernyataan tuntutan plaintif dengan kuasa yang diperuntukkan di bawah Aturan 33 kaedah 5 KKM 2012 ...

The Instant Appeal

[10] It would appear from the grounds of decision of the learned judge as set out above that the entire claim of the appellant was struck out solely on one ground. And that one ground was that the manager of the appellant, the same Sukhdev Singh, had failed to disclose that he was an undischarged bankrupt.

[11] So before us, although several issues were raised in the written submissions, the main issue canvassed was whether the learned judge had acted in excess of his jurisdiction when he decided that the order of the Taiping High Court granting leave to the appellant to proceed with the claim was bad in law. We agreed that this issue was pivotal to this appeal.

[12] On this issue, the second and third respondents argued that since Mr Sukhdev Singh's managerial position and his affirmation in the affidavit in the application for leave to institute the present proceedings was in contravention of ss. 38(1)(d) and (e) of the Bankruptcy Act 1967, the order granting such leave was defective and the learned judge was empowered under O. 33 rr. 2 and 5 of the ROC 2012 to consider and strike out the suit accordingly.

[13] The first respondent on the other hand supported the appellant's position and argued that the appeal should be allowed. The first respondent was a company in liquidation and all matters regarding the first respondent were in the hands of the appointed liquidator. The first respondent, through the liquidator, submitted that the crux of the dispute was the said land which was the subject-matter of the JVA between the first respondent and the appellant.

[14] The first respondent contended that there was non-accountability of the proceeds of sale of the said land amounting to the sum of RM1,834,900 which monies were not reflected in the bank statements from 2013 to 2014, the annual report for the year 2014 and the statement of affairs lodged by the ex-directors of the first respondent after its winding up.

[15] It was further contended that the sale of the said land was done below market value and the unilateral termination of the JVA was done fraudulently. The liquidator was duty-bound to preserve the only asset of the first respondent for the benefit of its creditors. It was submitted that the claim ought to be reinstated and the issues resolved in a full trial as there were serious issues to be tried.

[16] The appellant in turn argued that although the affidavit affirmed by Mr Sukhdev Singh did not disclose his bankruptcy, the learned judge was wrong to set aside the order of a court of co-ordinate jurisdiction. It was argued that although the learned judge was mindful of the principle in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 ("*Badiaddin*"), he had erroneously set aside the leave order based on the exception to the general rule.

[17] So the issue before us is quite straightforward. It is whether the *Badiaddin* principle was correctly applied by the learned judge. The principle was set out by the Federal Court in *Badiaddin*, *supra*, and is now commonly referred to as the *Badiaddin* principle. The Federal Court there, through the judgment of Mohd Azmi FCJ, set out the law as follows (*supra)* at pp. 92-93 (CLJ); p. 409 (MLJ):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... where a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

[18] And His Lordship continued his pronouncement (at p. 93 (CLJ); p. 409 (MLJ)):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of

> court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[19] The *Badiaddin* principle has been applied in many cases. The jurisprudence in relation to this principle was set out in succinct fashion by this court in *Ng King Chong & Anor v. Ooi Kim Geik & Ors* [2019] 2 CLJ 246 as follows at p. 259:

> The principles gained from the case authorities can therefore be expressed as follows. As a general rule, an aggrieved party who is dissatisfied with a final order of a court of unlimited jurisdiction must appeal to a higher court. The exception to this rule is that where an order is null and void on the grounds of breach of natural justice, illegality or lack of jurisdiction, such court will have the power under its inherent jurisdiction to set aside its own order. Where an order is a nullity, it can be successfully challenged in collateral proceedings.

[20] Reverting to the instant appeal, and after careful consideration, we came to the view that the learned judge had acted in excess of his jurisdiction in that he had erroneously applied the exception as stated in *Badiaddin*. It was plain to us that the learned judge fell into error for a number of reasons.

[21] Firstly, we were of the view that a court should not willy-nilly set aside an order made by another court of co-ordinate jurisdiction. The order made must be respected and can only be set aside in exceptional circumstances as set out in the *Badiaddin* case. If it does not come within the exceptions as set out in *Badiaddin*, the general rule must apply in that an aggrieved party must appeal to a higher court.

[22] In the present case, we did not think that the leave order was such as to fall within the exceptions. There was no question of the order being made without jurisdiction or being made in contravention of any statute or whether it was made in breach of the rules of natural justice. The only criticism is that the affidavit in support was defective as it was affirmed by a bankrupt who had not disclosed his status. In our view, the correct approach would have been to apply before the same winding up court and have the leave order set aside. It must be recalled, and this is significant, that no objection to the leave application was taken by the liquidator of the first respondent.

[23] Secondly, the second and third respondents were not parties in the winding-up proceedings. The leave order only concerned the first respondent in liquidation. It is doubtful whether the second and third respondents could be considered as parties aggrieved by the leave order. As such, they would not even have the *locus* to set aside the leave order if they had applied to the winding up court. As mentioned earlier, the first respondent had no objection to the leave order. Their interest is for the matter to be fully litigated so that the issue of fraud can be decided by the court.

[24] Finally, we noted that the claim of the parties in the High Court below was certainly not about whether the leave order ought to be set aside. There was no relief for the leave order to be set aside. It was only when the trial was about to commence that the second and third respondents raised the issue of whether leave was properly obtained.

[25] In our respectful view, the learned judge had no jurisdiction to consider the issue raised and ought to have declined to act under O. 33 of the ROC 2012. After all, the application was made on the eve of the trial and no formal application was even filed. Importantly, there was no material for the learned judge to act upon except for the pleadings which did not contain any relevant material on the issue raised. Instead, the learned judge appeared to rely on witness statements filed which had yet to be received into evidence. In our view, it was most inappropriate for the learned judge to have done so.

Conclusion

[26] In the circumstances, and for the reasons we have given, we were persuaded that the learned judge had fallen into grave error in resolving the dispute by resort to O. 33 of the ROC 2012 when he had no jurisdiction to do so. The appeal was accordingly allowed and the order of the High Court set aside. We also ordered the second and third respondents to each pay costs of RM20,000 here and below to the appellant. The action was remitted back to the High Court for trial. Deposit to be refunded.